STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
Y&G, INC.	:	DETERMINATION DTA NO. 814647
for Revision of a Determination or for Refund of Sales and Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1990 through August 31, 1993.	:	

Petitioner, Y&G, Inc., 1425 Bruckner Boulevard, Bronx, New York 10472, filed a petition for revision of a determination of for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1990 through August 31, 1993.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 3, 1996 at 9:15 A.M., with all briefs to be submitted by April 14, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared by Alfred J. Parisi, Esq. and Rose, Michlin, Karpf & Company (Bruce Danoff, C.P.A.). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Robert Tompkins, Esq., of counsel).

ISSUES

I. Whether petitioner has proven that its claimed nontaxable sales were exempt from tax pursuant to Tax Law § 1117.

II. Whether sending letters to petitioner's customers to independently verify petitioner's claimed nontaxable sales was an unreasonable audit method employed by the Division.

FINDINGS OF FACT

1. Petitioner sold used cars during the period September 1, 1990 through August 31, 1993 under the name of State Farm Auto Sales. The business was located at 120-15 Flatlands Avenue, Brooklyn, New York. Some, if not most, of petitioner's business involved selling damaged cars, and, in particular, damaged cars acquired from insurance companies.

2. The Division of Taxation (hereinafter "Division") informed petitioner by letter dated August 23, 1996 that a sales tax audit of petitioner's business had been scheduled. The letter was signed by Eva Faltas, the auditor in this matter.

3. Petitioner provided the auditor with sales tax returns, Federal and State income tax returns, sales journals, cash receipts journals, bank statements (some were missing), and resale certificates for the audit period. Sales invoices for a test period were provided (some invoices were missing). Petitioner also provided form 508, Motor Vehicle Register, known as a police book (hereinafter "police book") for the period September of 1991 through August of 1993,[1] and certain forms MV-50 Certificate of Sale (hereinafter "MV-50"). The latter is a New York State Department of Motor Vehicles (hereinafter "DMV") form.[2]

4. The auditor determined that petitioner's records were adequate to conduct the audit and an audit method election form was signed whereby petitioner and the Division agreed to a test period audit of petitioner's sales for the period June 1, 1991 through May 31, 1992. Results from this test period audit would then be projected over the entire audit period. Several consents extending the statutory time limits for the Division to assess tax were signed, the final one extending the period to assess tax until December 20, 1994.

5. The auditor determined from petitioner's records total gross sales for the test period of $4,995,291.00. The auditor then identified $2,071,420.00 in sales that petitioner had claimed were not subject to tax pursuant to Tax Law § 1117. The auditor requested substantiation for the asserted nontaxable transactions. Not counting the original audit appointment letter, there were four written requests for documentation to support the asserted exempt sales. The auditor did not receive what she determined to be sufficient documentation from the taxpayer.

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[1]The audit workpapers clearly state that a police book was provided for this period of time. The police book submitted into evidence at the hearing does not include this entire time period (see, Finding of Fact "16"). It would appear that the use of the term police book includes more than one actual book.

[2]It is not possible from the record to determine which or how many of these forms were provided for the test period. It is only possible to determine that some, but not all of the MV-50s were provided.

6. The auditor then mailed purchase questionnaires to each of petitioner's customers who purchased a motor vehicle within the test period, with the exception of other dealers. The auditor obtained addresses for this mailing from the records supplied by petitioner. Three sample letters and responses were introduced into evidence as part of the audit report. The letter requested that the purchaser provide the Division with the following information regarding any used car purchased from petitioner: date of purchase, purchase price, trade-in allowance, sales tax per invoice, net amount paid, amount paid by cash, amount paid by check, a copy of the bill/invoice/receipt, and a copy of both sides of any check used to pay for the motor vehicle. The auditor mailed 627 questionnaires with the following results:

NY customer - did purchase	58
NY customer - did not purchase - sales tax paid	6
NY address - undeliverable	65
Out-of-state address - did purchase	7
Out-of-state address - did not purchase (3 returned questionnaires, 2 telephone calls)	5
Out-of-state address - undeliverable	67
Unaccounted for	419

The auditor gave petitioner credit for the seven responses received back from customers with out-of-state addresses indicating that a purchase of a motor vehicle had been made.

It is petitioner's contention that the auditor disallowed all sales where a satisfactory response to the auditor's letter was not received. Petitioner points to the auditor's testimony on cross-examination in support of its assertion. A review of the audit workpapers, together with the auditor's testimony on redirect, makes it clear that the auditor first disallowed all of petitioner's claimed exempt sales pursuant to Tax Law § 1132(c), and then allowed those sales where she determined there was an adequate response to her letter.

7. Petitioner asserted during the course of the audit that the sales in question were nontaxable because they were sales to nonresidents of New York and therefore exempt pursuant to Tax Law § 1117. Petitioner's position was clearly communicated to the Division in a letter

to the auditor dated December 7, 1994[3] explaining the procedures followed by petitioner in selling a motor vehicle as follows:

> "The customer states whether he is a resident or non-resident of New York. If the person is a resident, the current sales tax is charged and collected. If a person is not a resident of New York, he states that fact and signs a bill of sale which indicates the following:
>
> "A. Make, model, color, and vehicle identification number of auto.
>
> B. Stock number of auto.
>
> C. Purchaser's name and address.
>
> D. Total cost of car and deposit on account.
>
> E. Signature of buyer.
>
> "As previously discussed with you, this is the same information that Section 1117. . . states is needed for non- residents. It does not state that additional documentary evidence is needed. It clearly states that an affidavit, statement or additional evidence is needed. Those are the guidelines my client has been using in the sale of cars."

It was therefore petitioner's position during the course of the audit and the hearing process that it had provided the Division with sufficient documentation to prove that the asserted exempt sales were not subject to tax under Tax Law § 1117.

8. The auditor did not agree with petitioner's position and determined that petitioner had provided inadequate documentation for nontaxable sales pursuant to Tax Law § 1117. Therefore, the auditor determined petitioner's additional liability by dividing the claimed nontaxable sales that she had disallowed by petitioner's gross sales for the test period to obtain a margin of error as follows: $2,071,420.00 (disallowed nontaxable sales per the auditor for the test period) divided by $4,995,047.00 (gross sales per petitioner's records for the test period) resulted in a 41.47 percent margin of error. The auditor then applied the margin of error to the gross sales per petitioner's records for the entire period of the audit to determine nontaxable

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[3]This letter was written by Mr. Bruce Danoff, one of petitioner's representatives, in response to a request from the Division for petitioner to describe what documentation it required from nonresident purchasers prior to determining no sales tax was due on the transaction. The letter was actually written after the Notice of Determination was issued, but it is an accurate and concise statement of petitioner's position as to what documentation is sufficient to prove an exempt sale under Tax Law § 1117.

sales for the entire audit period as follows: 41.47 percent of $17,791,047.00 (gross sales per petitioner's records for the entire audit period) resulted in $7,377,947.00 in additional taxable sales for the audit period.

9. On November 28, 1994, the Division issued to petitioner a Notice of Determination for sales and use taxes due for the period September 1, 1990 through August 31, 1993 for $608,680.65 in tax, $188,173.19 in interest and $237,512.90 in penalty for a total due as of that date of $1,034,366.74.

10. A Conciliation Order was issued on December 15, 1995, denying petitioner's request and sustaining the statutory notice. A petition contesting the order was filed with the Division of Tax Appeals on January 2, 1996.

11. Appearing as petitioner's witnesses were Mr. Bruce Danoff, its accountant and one of its representatives, and Mr. Yourik Atakhanian, its vice president. The majority of the testimony of these witnesses concerned the legal issue of whether it was possible to register a motor vehicle in New York State without a New York State address or a completed MV-50, including inspection information, and whether it is possible to register a motor vehicle in New York State without proof of payment of sales tax. Any portion of the witnesses' testimony relating to the particular practices of petitioner, to the extent it was relevant, has been included in the remaining findings of fact.

12. While not mentioned in the petition in this matter, petitioner's witnesses explained during the hearing that certain transactions that were disallowed by the auditor listed State Farm Auto Sales as both the seller and the purchaser. It was explained that these were salvage vehicles petitioner wished to repair prior to selling and that, under those circumstances, DMV required petitioner to obtain clear title to the motor vehicles. This required petitioner to, in effect, sell the vehicle to itself. This type of transaction did not involve any consideration, but was merely a transfer of title. In its brief the Division agrees that there are four such transactions occurring in the audit period and agrees that these transactions will be removed from the disallowed sales of the test period and that the tax will be recalculated based upon the

new margin of error obtained. The Division stated that these items are no longer at issue and that the Division would provide the identity of these items and a recalculation of the tax. The Division of Tax Appeals has not received such information from the Division or the petitioner. While these items are no longer at issue, they must be identified as they currently are included in the Notice of Determination. The four transactions as listed in the audit workpapers all set forth State Farm Auto Sales in Brooklyn as the purchaser and all show zero sales tax paid. The transactions are:

Date	Stock #	Make	Model	Sales Price	Page # of audit workpapers
12/04/91	A01928	85-FERR	TEST	$72,000.00	14
1/09/92	A01867	87-NIS	PU	$ 2,800.00	16
3/12/92	A02094	91-HON	ACC	$13,100.00	20
4/29/92	A02531	84-DAT	300ZX	$ 1,700.00	23

As agreed to by the Division these transactions are to be allowed for the test period and the amount of the assessment reduced accordingly.

13. The Division has a preprinted form, DTF-820, entitled Certificate For Purchase of Motor Vehicle By Non-Resident of New York State or Non-Resident of Local Taxing Jurisdiction, which it accepts as sufficient documentation that a sale qualifies as exempt under Tax Law § 1117. This form contains certain required information about the vehicle, and contains a statement that the purchase is not subject to sales tax:

> "because the purchaser is not a resident of New York State, does not have a permanent place of abode in this State and is not carrying on any employment, trade, business or profession in this State in which the motor vehicle will be used."

The form contains spaces for the purchaser's name, address, permanent place of abode, and, if the vehicle is used in a business, the business address. There is also a signature line for the purchaser. Petitioner did not use this form for transactions it claimed were exempt under Tax Law § 1117. Rather, petitioner submitted other evidence that it asserts substantiates the exempt nature of the transactions.

14. Each of petitioner's customers received a form MV-50. The MV-50 requires information about the motor vehicle being sold (such as the year, make, model, etc.), the dealer

and the purchaser (name and address information), the odometer reading of the motor vehicle, and the signature of the dealer and purchaser. Just above the signature lines is a dealer certification including language whereby the dealer certifies:

> "All New York State and local taxes due as a result of this sale have been collected from the purchaser. False statements made herein are punishable as a Class A misdemeanor pursuant to Section 210.45 of the Penal Law."

The instructions for completing the MV-50 support petitioner's position that an MV-50 is to be completed for the sale of each motor vehicle, including those to be registered or titled in another state, in that the instructions specifically state that for such cars the original MV-50 is to be given to the purchaser at the time of delivery of the motor vehicle.

15. Petitioner also submitted DMV form MV-82 entitled Registering a Vehicle in New York State. The form explains what paperwork is necessary for various different actions a person might take. For registering a car for the first time a sales tax clearance is required. Acceptable proof of sales tax clearance is:

> "1. If the vehicle is bought from a dealer, a Certificate of Sale (MV-50) or the original bill of sale indicating sales tax was collected.
>
> 2. If sales tax has not been paid to a registered New York dealer or to the Tax Department, it will be collected by DMV when the vehicle is registered and/or titled. Complete Form DTF-802.
>
> 3. If an exemption from sales tax is claimed, complete form DTF-803.
>
> 4. If partial sales tax was paid to another state, complete Form DTF-804 and pay the remainder of the tax due to New York State. The original bill of sale is required. Forms may be obtained from any Motor Vehicles office or from the Tax Department."

16. Also in evidence is a police book marked Book #7 Stock #2270-2666 with an opening date listed as March 21, 1992 and a closing date of May 21, 1992 (there are sales listed with dates after May 21, 1992). For each sale of a motor vehicle there is listed in the police book: date sold; sold to including name and address; MV-50 number; liens; information on the loan of dealer plates, if any; insurance company name, policy number and date; inspection station number, including inspection date and certificate number; and miscellaneous remarks including odometer readings. For those entries where an out-of-state address is listed for the

purchaser the notation "out of state" is listed in the column for insurance information and "NA" is listed in the column for inspection information. Each entry does have a listing in the MV-50 number column.

17. Petitioner was granted time after the close of the hearing to submit additional documentation as follows: DMV rules, regulations and procedures regarding the requirements of registering a motor vehicle in New York State; and computer records from DMV regarding the specific registration history, if any, in New York State of the particular vehicles sold by petitioner during the test period. Petitioner submitted copies of section 401 of the Vehicle and Traffic Law, DMV form MV-82.1 entitled Registering a Vehicle in New York State, DMV publication CR-81 entitled Information and Regulations For Junk and Salvage Vehicle Businesses, a DMV publication entitled Motor Vehicle Dealers and Transporters Regulations, and a group of documents that appear to be copies of computer screen printouts. These documents were received by the Division of Tax Appeals on January 13, 1997.

18. On February 10, 1997, together with petitioner's brief, petitioner submitted another copy of the computer printouts, this time with an accompanying affidavit. The affidavit is signed by Jeannie Pepa and provides:

> "I have worked with Department of Motor Vehicle paperwork for approximately 7 1/2 years.
>
> "The paperwork provided is from the Department of Motor Vehicles computer system. This paperwork shows the history of the questioned vehicles.
>
> "EXPLANATION:
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> 1. No Hit means there is no New York history on the vehicle.
>
> 2. Any car that shows current ownership still in the dealers [sic] name has never been submitted in New York.
>
> 3. Any car that comes up with a New York history has been put through an inspection.
>
> 4. With salvage history vehicles cars can be registered out of State and inspected in New York.
>
> 5. A car that is purchased as salvage does not have insurance or gas station emission. The car must be towed until inspected."

The information appearing on the printouts varies and there is more than one printout per page. Using the first two printouts as examples, the information provided is as follows:

Printout Number One

1). Towards the top of the printout is handwritten "#2399".

2). The results of the search are listed as "YOUR SEARCH RESULTED IN A 'NO-HIT' CONDITION. YOUR SEARCH ARGUMENT WAS JT2MX83ESL0063787 PRESS ENTER TO RETURN TO THE MENU."

Printout Number Two

1). Towards the top of the printout is handwritten "#2411".

2). In the upper right hand corner appears "BALANCE: 258.00".

3). The printout goes on to list: Raquel D. Wallace as the current owner; the vehicle identification number and description; an address of 729 East 31st Street, Brooklyn; a statement that the owner of the vehicle and the registrant are different; and the plate number of the registrant.

4). The printout states that title was issued on November 18, 1992.

5). Under prior owners are listed first the current owner at the above address, then Raguel [sic] D. Wallace with an address of 455 Emory Street, Norfolk, Virginia, and then petitioner. Above each of the prior owners the printout states "TITLE ONLY".

Petitioner provided no accompanying explanation of the documents other than the affidavit of Ms. Pepa. There is no detailed explanation connecting the motor vehicles listed in the computer printouts to transactions occurring during the audit period. It appears that the handwritten numbers on the printouts are stock numbers which could provide a means of relating the printouts to petitioner's transactions. However, the only lists of transactions in the record that include stock numbers are those included in the audit work papers and those are only for the test period, not the entire audit period. Neither stock number 2399 nor 2411 appear on the auditor's list. Therefore, the first printout for stock number 2399 cannot be matched to any transaction in the record. Pursuant to the affidavit of Ms. Pepa, since a search for this motor vehicle resulted in a no-hit, it means that this vehicle has no New York history. However, there is no method of verifying that this vehicle was included in the audit.

The police book lists customer names, and since names appear on some of the computer printouts it is possible to at least attempt to match the printouts to transactions in the audit or

test period. Stock number 2411 is in the police book. The date sold (from the police book) and the date the title was issued (from the computer printout) are both August 11, 1992 which is not in the test period and explains why this transaction is not listed in the audit work papers. According to Ms. Pepa's affidavit, since this motor vehicle has a New York history, the car has been inspected; if it were a salvage vehicle it could have been inspected in New York and registered elsewhere; and, if it were purchased as a salvage vehicle, it must be towed until it is inspected because it does not have insurance or gas station emission. This computer printout is particularly confusing since it states that the owner and registrant are not the same and lists the registrant's plate number. It is not possible to tell whether that is a New York State registration or an out-of-state registration, nor is this explained. Nor is it explained anywhere what "BALANCE: 258.00" means, or if the number is applicable to fees owed DMV or to sales tax.

19. It is petitioner's position that it need not submit the documentation required by Tax Law § 1117 on the form prepared by the Division, but that it is sufficient to provide the required information in any form. Petitioner contends that the bills of sale, MV-50s and the police book listing out-of-state addresses for purchasers, together with the requirement that a car cannot be registered in New York State without payment of sales tax and that the motor vehicles sold by petitioner to customers with out-of-state addresses were never registered in New York State, is sufficient documentation to prove that the transactions at issue were not subject to sales tax pursuant to Tax Law § 1117. Furthermore, petitioner argues that the Division should have been required to check with DMV to determine whether any of the motor vehicles that were the subject of the sales disallowed by the auditor were ever registered by New York State, and that the Division should not have based its audit on unreliable customer questionnaires.

20. The Division argues that even if petitioner's assertions are taken as true, petitioner has not sustained its burden of proof in documenting that the sales were exempt under Tax Law § 1117. The Division admits that its form 820 is not the sole method for a taxpayer to prove that it had nontaxable sales pursuant to Tax Law § 1117. However, the Division argues that for a sale of a motor vehicle to be exempt pursuant to that provision the purchaser must be a

nonresident of New York State, have no permanent place of abode within the State, and have no business that would require the motor vehicle to be driven in New York State. Furthermore, whatever form of documentation a taxpayer chooses to rely on must provide evidence of all of these statutory requirements. The Division argues that petitioner's documentation, which tends to prove only an out-of-state address, is insufficient.

21. Petitioner argues that through the computer printouts, it has proven that its claimed nontaxable sales involve cars that were either never registered in New York or were not registered in New York directly after the transaction. Furthermore, any cars registered at a later date could only be registered upon payment of the sales tax.

The Division's brief included an argument that petitioner's computer printouts should not be allowed into evidence because: there are no official DMV markings on the documents, there is no official explanation of the term "no hit," it does not appear that all vehicles in the period were searched, and the documents do not clearly indicate registration or sales tax history. In response petitioner argues that the affidavit explaining the printouts stated: that the records were obtained from the DMV computer system; adequately explained the term "no hit"; and that the affiant was an independent agent.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1105(a) retail sales of motor vehicles in New York State are subject to sales tax except as otherwise provided in Article 28 of the Tax Law. Petitioner was required to collect sales tax at the time that it received payment for the motor vehicles sold (see, Tax Law § 1131[a]; § 1132[a]). Since petitioner did not collect tax on the transactions in question it is presumed that all of the transactions were taxable until petitioner has proven otherwise pursuant to Tax Law former § 1132(c) which provides:

> "For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer."

B. Petitioner claims that the sales of motor vehicles at issue in this matter were not

subject to sales tax because the sales were made to nonresidents. The exemption from tax that petitioner is relying on is set forth in Tax Law former § 1117[4] as follows:

> "(a) Receipts from any sale of a motor vehicle shall not be subject to the retail sales tax imposed under subdivision (a) of section eleven hundred five, despite the taking of physical possession by the purchaser within this state, provided that the purchaser, at the time of taking delivery:
>
> (1) is a nonresident of this state,
>
> (2) has no permanent place of abode in this state,
>
> (3) is not engaged in carrying on in this state any employment, trade, business or profession in which the motor vehicle will be used in this state, and
>
> (4) prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the tax commission may require to assure proper administration of the tax imposed under subdivision (a) of section eleven hundred five."

Contrary to petitioner's arguments, the exemption contained in Tax Law § 1117 is not an exemption for sales of motor vehicles to nonresidents. Rather, the exemption is allowed for sales to nonresidents who also have no permanent place of abode in New York State or no business in which the motor vehicle purchased will be used in New York State.

Petitioner's argument appears to be based on the premise that a sale to a nonresident person or entity as that term is commonly understood should satisfy the requirements of Tax Law § 1117. First, the plain language of the statute clearly contradicts petitioner's assertion. When construing a statute the primary focus is on the intent of the Legislature in enacting the statute (McKinney's Cons Laws of NY, Book 1, Statutes § 92[a]; see, Matter of Sutka v. Connors, 73 NY2d 395, 541 NYS2d 191; Matter of American Communications Technology v. State of New York Tax Appeals Tribunal, 185 AD2d 79, 592 NYS2d 147, affd 83 NY2d 773, 611 NYS2d 125). When that intent is clear from the wording of the statute itself, the inquiry ends (McKinney's Cons Laws of NY, Book 1, Statutes § 76; see, Matter of American Communications Technology v. State of New York Tax Appeals Tribunal, supra). When the issue to be decided is whether the taxpayer is entitled to an exclusion or exemption from tax,

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[4]Tax Law § 1117 has been amended since the audit period. Those amendments do not directly affect the issues in this matter. Therefore, all other references to the statute in this determination will simply refer to Tax Law § 1117.

the taxpayer is required to prove that its interpretation of the statute is the only reasonable interpretation, or that the Division's interpretation is unreasonable (see also, Matter of Grace v. State Tax Comm., 37 NY2d 193, 371 NYS2d 715; Matter of Federal Insurance Co. v. State Tax Comm., 146 AD2d 888, 536 NYS2d 595). Petitioner in this case cannot prove that its interpretation of the statute is the only reasonable one or that the Division's interpretation is incorrect. The statute very clearly describes what transactions are not subject to tax, i.e., sales of motor vehicles to nonresidents with no permanent place of abode in New York State, or a nonresident business that will not use the motor vehicle in New York State for business purposes. Petitioner has cited no authority for the proposition that Tax Law § 1117 provides an exemption for sales of motor vehicles to all nonresidents.

Second, the term resident for purposes of sales and use tax has a specific meaning somewhat different than that ascribed to it in everyday language. 20 NYCRR 526.15 defines resident as:

> "(a) Individuals. (1) Any individual who maintains a permanent place of abode in this State is a resident.
>
> * * *
>
> "(b). . . . (2) Any person while engaged in any manner in carrying on in this State any employment, trade, business or profession shall be deemed a resident with respect to the use in this State of tangible personal property or services in such employment, trade, business or profession."

Therefore, a nonresident who maintains a permanent place of abode or uses tangible personal property in New York State in a business, is a resident for purposes of administering the sales and use tax. Accordingly, petitioner is technically correct in stating that sales of motor vehicles to nonresidents are not subject to tax. However, to be considered a nonresident as that term is defined in the regulations a person can not have a permanent place of abode or cannot use the property in question in a business in New York State.

C. It is necessary to review petitioner's proof to determine if any of the transactions at issue qualify for the Tax Law § 1117 exemption. Tax Law § 1117(b) describes the proof necessary to relieve a vendor of having to collect tax as follows:

> "A vendor shall not be liable for failure to collect tax on receipts from any sale of a motor vehicle provided that the vendor prior to making delivery obtains and keeps available for inspection by the tax commission any affidavit, statement or additional evidence, documentary or otherwise, as may be required to be furnished under subdivision (a) above; provided that such affidavit, statement or additional evidence is not known by the vendor, prior to making physical delivery of the motor vehicle, to be false."

Under this provision a vendor will not be liable for the sales tax on the sale of a motor vehicle if prior to the delivery of the vehicle the vendor obtains any affidavit, statement or additional evidence, documentary or otherwise, as may be required to be furnished under subdivision (a) above. Subdivision (a) of Tax Law § 1117 describes the evidence required as that which the commissioner may require to assure proper administration of the tax.[5]

Pursuant to this provision, the Division has available a form DTF-820 which, if properly completed, received by the vendor prior to delivery of the motor vehicle and retained by the vendor would relieve the vendor from liability to collect the tax provided that prior to delivering the vehicle the vendor does not know such statement to be false. It is undisputed that petitioner did not use form DTF-820 for the transactions petitioner claims were exempt sales under Tax Law § 1117. However, petitioner is correct, and the Division admits, that, pursuant to Tax Law § 1117(a)(4) and (b), DTF-820 is not the exclusive method of proving that the transactions at issue are not subject to tax (see, RAC Corp. V. Gallman, 39 AD2d 57, 331 NYS2d 945). The issue then is whether, on the evidence submitted by petitioner, petitioner has met its burden of proof.

D. Petitioner argues that the computer printouts it submitted show that none of the motor vehicle sales it claims are exempt from sales tax were registered in New York directly after the time of the sale and that therefore, since the motor vehicles were sold to nonresidents and not registered in the State, the sales were exempt. The first issue to be dealt with is whether the introduction by petitioner of the computer records should be allowed. Proceedings in the Division of Tax Appeals are not governed by technical rules of evidence provided that the evidence to be introduced into the record is relevant to the issues in the case (20 NYCRR

[5]Prior to a 1994 amendment, this provision referred to tax commission instead of the commissioner. However, pursuant to Tax Law § 2(1) it would have been interpreted as commissioner in any event.

3000.15[d]). The computer printouts submitted by petitioner are relevant to petitioner's argument that because the motor vehicles were not registered in New York State the sales were not subject to tax. On this basis the records submitted by petitioner are admitted. I do not, however, find these documents reliable.

There is no indication on the face of the printouts that the records came from the DMV computer system. Petitioner argues that since the affidavit of Ms. Pepa states that the records were obtained directly from the DMV computer system this suffices as authentication. The short statement in the affidavit that the affiant has worked with DMV records for seven and one-half years does not qualify this affiant to attest to the authenticity of these records. There is no explanation as to what her qualifications or even current position are, or what her relationship is to petitioner. There is no other information in the affidavit from which I am able to judge the credibility of the affiant. Furthermore, there is no means of matching the computer printouts to the particular transactions that were the subject of the audit, making it impossible to determine exactly what the records prove. For these reasons, the computer printouts submitted by petitioner simply cannot be considered competent and reliable evidence. Therefore the printouts do not prove either that none of the vehicles were registered in New York directly after purchase, or that most of the vehicles were never registered in New York.

It should be noted that, even if petitioner had proven that none of the motor vehicles purchased during the audit period were ever registered in New York State, that would merely be another indication that the vehicles were sold to nonresidents and would do nothing to prove that such nonresidents did not have a permanent place of abode in New York State or a business in which the motor vehicles would be used in New York State.

E. There remains petitioner's contention that pursuant to statute and DMV requirements a car cannot be registered in New York if the applicant has an out-of-state address or if sales tax has not been paid. It is unclear, but it appears that petitioner is arguing that since Vehicle and Traffic Law § 401 requires a vehicle to be registered in New York State prior to driving on State highways, all requirements of Tax Law § 1117 have been met (i.e., if a vehicle cannot be

registered without payment of sales tax and cannot be driven on New York State highways without being registered, no nonresident could ever drive a vehicle on New York State roads). Contrary to petitioner's assertions the Vehicle and Traffic Law does not require that every car driven on New York State roads be registered in New York. Vehicle and Traffic Law § 401(1) states that a vehicle must be registered under Article 14 of such law before being driven on New York highways except as otherwise expressly provided in this chapter. Vehicle and Traffic Law § 250 provides that if a vehicle is owned by a nonresident of this State who has complied with provisions of his or her own jurisdiction, the provisions of Article 14 regarding registration of motor vehicles do not apply (see, Shuba v. Greendonner, 271 NY 189, 2 NE2d 536). Therefore, under the Vehicle and Traffic Law it is entirely possible that a person living in, for example, New Jersey, could drive a car with a New Jersey registration in New York State. It is equally possible that this person could have a permanent place of abode in New York State, or use the motor vehicle for business purposes in New York State. If this person purchased the vehicle in New York State, sales tax was due. However, while sales tax should have been paid at the time of purchase, this car may never be required to be registered in New York State.

F. Taken as a whole petitioner has submitted evidence such as the MV-50s, bills of sale and police book showing out-of-state addresses and DMV requirements to prove that the sales in question were to out-of-state residents. The fact that a vehicle was not registered in New York State and the customer provided an out-of-state address is indicative that the purchasers were out of state. However, even if these assertions are true, petitioner has failed to meet its burden of proof. Furthermore, the dealer certification contained in the MV-50, to the effect that all taxes have been paid, does not prove that the statement is true without supporting documentation.

Petitioner needed to present documentation to support all of the requirements of Tax Law § 1117. Petitioner did not introduce any evidence tending to show that the purchasers of the motor vehicles did not have permanent places of abode in New York State or businesses in which the motor vehicle purchased would be used in New York State. The evidence produced

by petitioner was consistent with its argument that it simply had to prove that the transactions at issue were sales to customers with out-of-state addresses and the motor vehicles sold were not registered in New York State. It appears that petitioner has simply chosen to ignore the remaining requirements of the statute. Petitioner argues that, pursuant to Tax Law § 1117(b), since it accepted its customers' out-of-state addresses in good faith, it can not now be held liable if the sales are found to be taxable. In order for petitioner to be protected under Tax Law § 1117(b), it needed to accept its customer's evidence of exemption in good faith. This means that the information provided by the customers had to, at a minimum, exhibit compliance with all three requirements of Tax Law § 1117(a). The documentation accepted by petitioner clearly did not address the statutory requirement of not having a permanent place of abode in New York State or not intending to use the vehicle for business in New York State. Therefore, petitioner could not have accepted this documentation in good faith (see, Matter of Entech Management Services Corp., Tax Appeals Tribunal, June 23, 1994.)

G. Petitioner also maintains that it was improper for the auditor to rely on questionnaires to disallow exempt sales. The auditor did not rely on the questionnaires to disallow exempt sales. This audit was conducted using the books and records of petitioner. The auditor determined gross sales for the test period and gross sales for the entire audit period using petitioner's books. The auditor then reviewed the sales petitioner claimed were exempt under Tax Law § 1117. Having determined that the documentation provided by petitioner, which consisted of bills of sale, MV-50s and the police book, at most proved that the customers had an out-of-state address, the auditor disallowed these sales as not having substantiation. It is reasonable for the Division to disallow all claimed nontaxable sales when it determines there is insufficient documentation (see, Matter of On the Rox Liqs., Ltd. v. State Tax Commn., 124 AD2d 402, 507 NYS2d 503, lv denied 69 NY2d 603, 512 NYS2d 1026; Matter of Savemart v. State Tax Commn., 105 AD2d 1001, 482 NYS2d 150, appeal dismissed 64 NY2d 1039, 489 NYS2d 1029, lv denied 65 NY2d 604, 493 NYS2d 1025). As stated by the Tax Appeals Tribunal in Matter of Dacs Trucking (Tax Appeals Tribunal, March 21, 1991):

> "The language of Tax Law § 1132(c) is clear: all receipts of the described types (including the receipts at issue here) are presumed to be taxable until the contrary is established and the burden of proving that any receipt is not taxable is on the taxpayer. The purpose of this section is contained in the section itself so it need not be inferred; it is to allow for the proper administration of the tax and to prevent tax evasion. Once the Division has identified receipts for property or services of the types indicated for which tax has not been paid, this section does not impose on the Division a further burden to show that each of the taxpayer's receipts are in fact taxable (see, Matter of Koren-Di Resta Constr. Co. v. State Tax Commn., 138 AD2d 909, 526 NYS2d 654, lv denied 72 NY2d 805, 532 NYS2d 755; Matter of Mendon Leasing Corp. v. State Tax Commn., 135 AD2d 917, 522 NYS2d 315, lv denied 71 NY2d 805, 529 NYS2d 276; Matter of On the Rox Liqs. v. State Tax Commn., 124 AD2d 402, 507 NYS2d 503, lv denied 69 NY2d 603, 512 NYS2d 1026)." (Matter of Dacs Trucking, Tax Appeals Tribunal, March 21, 1991.)

In this case after disallowing the claimed nontaxable sales the auditor sent a letter requesting verification of a purchase for all purchasers during the test period except for other dealers. Of all the letters sent to out-of-state addresses, seven responded that a purchase had been made and provided sufficient information to the auditor for the auditor to allow the purchases as exempt. While the questionnaires did not inquire into each element of Tax Law § 1117, the auditor had the discretion to allow these transactions. (see, Matter of Lombard, Tax Appeals Tribunal, March 6, 1997).

H. The petition of Y&G, Inc. is granted to the extent set forth in Finding of Fact "12", but is in all other respects denied. The Notice of Determination dated November 28, 1994, as modified by Finding of Fact "12", is sustained.

DATED: Troy, New York
October 9, 1997

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE